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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 518.

M. C. GARBER, PETITIONER,

VS.

RALPH CREWS, CHARLEY CREWS, ROBERT CREWS, EVERETT CREWS, AMY TRESNER, NEE CREWS, AND MARY WILLIS, NEE CREWS, RESPONDENTS.

BRIEF OF PETITIONER.

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STATEMENT OF CASE.

By this proceeding, the petitioner seeks a review of a judgment of the United States Circuit Court of Appeals, Tenth Circuit, affirming a judgment of the District Court of the United States for the Western District of Oklahoma, against petitioner in an action wherein respondents were plaintiffs and petitioner was a defendant, and for a reversal of such judgments.

The judgment of the Circuit Court of Appeals sought to be reviewed, was entered on July 6, 1944; Petition for Rehearing denied August 26, 1944. The opinion delivered by the Circuit Court of Appeals has not yet been printed in the official reports but is found in advance sheet of November 6, 1944, Federal Reporter, Second Series, page 665, under the title, *Hoehn et al.* v. *Crews et al.*, and Six Other Cases, Nos. 2870-2876. This original opinion is also found in the printed record in this case commencing on page 108, and the opinion on Rehearing commencing on page 131.

Certiorari was granted by this court on November 13, 1944, limited to the first question presented by the Petition for the writ. Other Petitions for Certiorari arising out of the same case were denied.

JURISDICTION.

This court has jurisdiction to review the judgment of the Circuit Court of Appeals by virtue of 28 U. S. C. A., Sec. 347.

STATEMENT OF THE MATTER INVOLVED.

An action was instituted in the District Court of Garfield County, Oklahoma, on December 14, 1931, by the respondents as plaintiffs against the American National Bank of Enid and others as defendants, and their Amended Petition upon which the case was tried was filed in said court on July 8, 1933 (See Record page 102; Original Transcript page 236).

This action came to trial in that court in the month of October, 1937, and resulted in a verdict and judgment therein against the defendant, American National Bank of Enid, alone on October 29, 1937, for the sum of $249,000

(for Journal Entry of that Judgment, see Record, pages 104-107). Upon the trial of that case, the court sustained the demurrers of the individual defendants to the evidence and dismissed the case as to them. The individual defendants were part of the former directors of the American National Bank.

The basis of that action was that on June 13, 1922, the respondents, through their representatives, had entered into a contract with the Garber Refining Company of Garber, Oklahoma (See Original Transcript pages 282-284), whereby the Garber Refinery contracted to purchase from them the oil produced from certain lands belonging to them upon which the Sinclair Oil and Gas Company held an oil and gas mineral lease and they were engaged in litigation with it in which they sought to cancel the lease.

The proceeds of the sale of this oil were to be deposited in the Farmers State Bank of Garber, Oklahoma, in escrow, out of which the respondents were to be paid their one-eighth royalty plus certain allowances for expenses of development and the balance was to be invested in United States Government Bonds pending the outcome of such litigation.

A large amount of money was deposited in that bank over a period of years and in the month of October, 1930, the litigation was compromised and the respondents made demand upon the Farmers State Bank of Garber for their bonds and money.

Soon thereafter events transpired which revealed the fact that practically all of the money deposited in that bank and the bonds purchased therewith had been dissipated and that the bank was unable to produce the same.

The American National Bank had acted as a correspondent bank for the Farmers State Bank of Garber and

the original action brought by the respondents against the American National Bank and some of its directors on December 14, 1931, was instituted upon the contention made by them that certain of the officers and representatives of the American National Bank had aided and abetted the Farmers State Bank of Garber and certain of its officers and representatives in misappropriating and dissipating the funds deposited in that bank and the bonds purchased therewith.

The directors of the American National Bank who were individually made defendants in that action were exonerated but judgment was rendered against the bank.

The officers and directors of the American National Bank who were charged with the commission of the wrongful acts were named as defendants, but no service of summons was ever had upon them and they never, in fact, became parties to the case.

After that judgment was obtained by the respondents as plaintiffs against the American National Bank, this action was filed in the District Court of the United States for the Western District of Oklahoma to collect that judgment. The defendants were those who had been the stockholders and directors of the American National Bank. There were three causes of action set forth in the complaint involving the following state of facts:

On November 25, 1929, the American National Bank of Enid sold practically all of its assets and its business to the First National Bank of Enid, which on its part assumed all of the known liabilities of the American National Bank. A copy of this contract between these banks is found in the Record, pages 88-93 (Original Transcript pages 211-216). The First National Bank agreed to pay the American National Bank the sum of $350,000 in addition to taking over responsibility for its deposits and all

known obligations. Of this amount $240,000 in cash was paid to the American National Bank; $100,000 was retained to guarantee collection of the paper taken over by the purchasing bank; $10,000 by permitting the selling bank to retain certain real estate. This transaction was consummated on November 25, 1929, and the business and assets of the American National Bank were on that date, turned over to the First National Bank of Enid, and it took over the business.

After the sale of its business by the American National Bank to the First National Bank of Enid, and provision having been made for the payment of all of the known obligations of the American National Bank, the sum of $240,000 was by the directors of the American National Bank, paid back to those who were the stockholders of the American National Bank on November 25, 1929, representing the par value of their stock plus their proportionate part of the surplus of the bank. The petitioner, M. C. Garber, received no part of this fund, he not being a stockholder at that time.

In the first cause of action in this case, the plaintiffs, as a judgment creditor of the American National Bank, sought to recover back from its stockholders, the $240,000 which had been paid to them claiming that it constituted a trust fund for their benefit and which they were entitled to pursue and recover back.

In the second cause of action they sued the stockholders for double liability. M. C. Garber was made a defendant in this second cause of action and they sought to recover from him upon the theory that he had sold his stock within sixty days next before the date of the failure of the American National Bank to meet its obligations or with knowledge of such impending failure.

The third cause of action was against a part of those who had been directors of the American National Bank

claiming that they had violated their duties as such directors in disbursing this fund of $240,000 and paying the same back to the stockholders.

The case at bar was filed in the District Court of the United States for the Western District of Oklahoma on January 20, 1938, and after certain preliminary proceedings, had been had the further proceedings in the case were stayed by order of the court pending the determination by the Supreme Court of the State of Oklahoma of the appeal of the American National Bank in the original action. The judgment of the lower court was affirmed in that case by a bare majority of the court (191 Okla. 53, 126 Pac. 2d 733).

Subsequent to the final termination of that case this case was brought to trial in the lower court and was tried to the court without a jury and went to judgment on September 16, 1943 (See Record page 72). On the first cause of action judgment was rendered against all of the stockholders for the amount of money which had been returned to them representing their investment in the capital stock of the bank plus surplus.

On the second cause of action, which was for the purpose of enforcing the double liability of the stockholders under Pars. 63 and 64, Title 12, U. S. C. A., the court levied an assessment against the stockholders and rendered a personal judgment against all stockholders for $15.17 per share and retained jurisdiction as to all matters pertaining to the necessity of and the making and enforcement of additional assessments against shareholders and the liability therefor (See Record pages 74-82).

It was on this second cause of action that judgment was rendered against the petitioner, M. C. Garber (See Record, Paragraph 13, page 78). It was from this judgment that he appealed to the United States Circuit Court

of Appeals for the Tenth Circuit and which court on July 6, 1944, rendered its judgment affirming the judgment of the trial court against petitioner and rendered its opinion in said cause (See Record pages 119-120).

Petitioner, M. C. Garber, as well as other appellants in that action, filed a petition for rehearing in the Circuit Court of Appeals and on August 26, 1944, that court denied his petition for rehearing and filed an additional opinion as to him on rehearing (See Record page 131).

The third cause of action has gone out of the case. The trial court rendered judgment on that cause of action against those of the directors of the American National Bank who had been made defendants on that cause of action for $188,280 plus interest and costs. From that judgment, the directors prosecuted an appeal to the Circuit Court of Appeals and by which court that judgment was reversed with directions to dismiss such third cause of action and which reversal has become final.

Reference will be hereafter made to certain parts of the opinion of the Circuit Court of Appeals reversing the judgment on that cause of action as they are important as to the facts therein referred to and conclusions of law reached as bearing upon the determination by that court of the Appeal of petitioner, M. C. Garber, from the judgment rendered against him on the second cause of action.

After the sale of its business to the First National Bank and on December 20, 1929, the stockholders and directors of the American National Bank held meetings and by proper action for that purpose went into voluntary liquidation as provided by Par. 181, Title 12, U. S. C. A., elected a liquidating agent, fixed the amount of his bond and took all steps necessary for the orderly liquidation of the affairs of the bank (See Minutes of Meetings of Stockholders and Directors, pages 97-99 of Record), and proceeded thereafter with such liquidation and its business

and affairs had been wound up and practically completed during the period of nearly two years from the date it went into voluntary liquidation on December 20, 1929, and more than two years after it had sold its business to the First National Bank of Enid, on November 25, 1929, when the claim of the plaintiffs was first asserted by the filing of their action on December 14, 1931, against the American National Bank and certain of its directors, and in which action they subsequently recovered the judgment sought to be enforced in this action. (In some places in the Statements of Matters Stipulated and other places in the Record, the date of the filing of this suit is given as December 16, 1931, which is merely a clerical error and makes no difference, the correct date, however, being December 14, 1931.)

The sole ground upon which liability was asserted against the defendant, M. C. Garber, under the second cause of action, was predicated upon that part of Par. 64, Title 12, U. S. C. A., which provides that the stockholders in any National Banking Association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, etc.

It is the contention of petitioner that under the admitted and undisputed facts in this case that he is not liable under said section when properly interpreted, and for the purpose of placing before this court the pertinent facts pertaining thereto, the following is a summary thereof.

Keeping in mind that the American National Bank of Enid, sold its business to the First National Bank of Enid on November 25, 1929, and quit business as a bank, having

made ample provision for the payment of all of its known liabilities, and that M. C. Garber, appellant, sold all of his stock in the American National Bank in good faith to D. J. Oven on November 14, 1929, and that the original suit of the respondents was filed against the American National Bank and certain of its officers and directors on December 14, 1931, we quote the following from the Amended Petition of the plaintiffs in the original suit against the American National Bank and certain of its directors (See Record page 103):

> "(14) That none of the matters and things herein alleged and set forth respecting the embezzlement, misappropriation, conversion, etc., of said deposit and or of said 'Crews Estate Oil & Gas Producers, Escrow' account, funds, money, Liberty Bonds and or Treasury Certificates, accrued interest proceeds thereof, etc., or of the failure of said banks, and each of them, and their officers and directors, and each of them, to faithfully, honestly and diligently perform the duties incumbent upon them, were discovered by these plaintiffs, or any of them, until within approximately one year next preceding the commencement of this action, and these plaintiffs, and none of them, knew or had any knowledge or notice of the hereinbefore alleged fraudulent acts of said Farmers State Bank and its officers and directors, and said American National Bank, and its officers and directors, or of such fraudulent acts on the part of any of such officers and directors, or of such fraudulent acts on the part of the defendants, herein, or any of them, and did not know or discover the same until within approximately one year next preceding the commencement of this action, and that all the matters and things herein alleged respecting the aforementioned fraudulent conversion by the defendants, and each of them, and the aforementioned fraudulent misconduct and conversions, etc., of the officers and directors of said American National Bank, and the fraudulent miscon-

duct, conversions, etc., of the officers and directors of said Farmers State Bank, and each of them, to perform faithfully, diligently and honestly the duties of their office as such officers and directors, and of the fraudulent conversion and misappropriation of said 'Crews Estate Oil & Gas Producers, Escrow' account, funds, money, Liberty Bonds and or Treasury Certificates, accrued interest, proceeds thereof, etc., HAVE BEEN DISCOVERED BY THESE PLAINTIFFS WITHIN APPROXIMATELY ONE YEAR NEXT PRECEDING THE COMMENCEMENT OF THIS ACTION, AND SINCE OCTOBER 15, 1930, AND PRIOR TO SUCH TIME, AND UP UNTIL SUCH DISCOVERY, PLAINTIFFS, AND EACH OF THEM, AT ALL TIMES BELIEVED THAT THE AFFAIRS OF SAID BANKS WERE BEING HONESTLY ADMINISTERED AND THAT THE OFFICERS AND DIRECTORS OF SAID BANKS WERE FAITHFULLY, DILIGENTLY AND HONESTLY PERFORMING THEIR DUTIES AS SUCH and that the aforesaid deposit and 'Crews Estate Oil & Gas Producers, Escrow,' account, funds, money, Liberty Bonds and or Treasury Certificates, accrued interest proceeds thereof, etc., were being honestly administered, preserved and safely kept, and that same was intact and that same, and every part thereof, was available for delivery upon demand and could and would be delivered by said banks upon demand" (the emphasis is ours).

It is an agreed fact in this case that the American National Bank was, up to the date of November 25, 1929, when it sold its business, a solvent and going concern, leaving out of consideration, the claim thereafter asserted by the respondents by the filing of their action against the American National Bank and some of its directors on December 14, 1931. Also that there were no other creditors of the American National Bank than the respondents (See Statement of Matters Stipulated at page 30 of Record).

"(c) That there are no creditors of the American National Bank of Enid, other than the plaintiffs in this action."

The trial court in his findings of fact also made a finding to that effect (See Record page 54). The trial court also found (See Record page 53).

"10. Until November 25, 1929, the bank was a going concern and was believed by all the defendants here defending to be a solvent as well as a going concern."

In the trial court an Agreed Statement of Facts in writing was entered into between the parties to this action including a Stipulation of Facts as to the defendant (petitioner, M. C. Garber). It is found at Paragraph 15 of such Stipulation and is as follows (See Record pages 34-35):

Stipulation of Facts As to M. C. Garber.

"15. That on November 14, 1929, the defendant, M. C. Garber, for a valuable consideration sold and delivered to the defendant, D. J. Oven, his stock in the American National Bank of Enid, being 125 shares, and the certificate evidencing the same was duly endorsed by the said M. C. Garber and transferred to the said D. J. Oven; that such certificate was duly surrendered to the American National Bank of Enid, and a new certificate No. 100, for such 125 shares of stock was, on November 14, 1929, issued and delivered to the said D. J. Oven; that on November 14, 1929, and up to November 25, 1929, the date the American National Bank of Enid, sold its business and assets to the First National Bank of Enid, the American National Bank of Enid was a solvent and going concern, not taking into consideration and excluding the claim of the plaintiffs in this case, upon which they filed suit on December 16, 1931, and which claim was subsequently reduced to judgment in that action and

is the $249,000.00 judgment which is the basis of this action; that the circumstances of such sale of his stock by the said M. C. Garber to the said D. J. Oven were that a few days prior to November 14, 1929, the said D. J. Oven went to the said M. C. Garber and sought to purchase from him his stock in the American National Bank. That the said M. C. Garber thereupon told him that he would take the matter under consideration and advise him later. That a few days later the said D. J. Oven again saw the said M. C. Garber, and the said M. C. Garber advised him that he had considered the matter and concluded that if the said D. J. Oven would buy his stock in the American National Bank and also some stock which he owned in the American National Mortgage Company and the American Building Company so as to clean up his investment in all these companies, that he would sell provided that they could agree upon the price.

"That they thereupon did agree upon the price for the stock of the said M. C. Garber in the American National Bank and in the other companies mentioned, the total price for all being $25,625. That the sale was consummated on November 14, 1929, and the said D. J. Oven paid him for such stock by giving him a check for $825.00 and five promissory notes for $5,000.00 each due at intervals and which notes were paid before they became due in the month of December, 1929.

"That it shall be considered, that, subject to objection as to its competency, relevancy and materiality by plaintiffs, the defendant, M. C. Garber, testified that at the time of such negotiations and of the consummation of the sale of such stock by M. C. Garber to D. J. Oven, on November 14, 1929, the said M. C. Garber had no information to the effect that the American National Bank contemplated selling its assets and business to the First National Bank and going out of business, and that at such time the defendant, M. C. Garber, knew nothing of any claim by the plaintiffs against the American National Bank.

and believed the American National Bank to be fully solvent at such time, and had no knowledge of any impending failure of the American National Bank, and the sale of his stock by the said M. C. Garber was made in good faith and without any intention of trying to avoid liability as a stockholder in such bank."

In the Findings of Fact and Conclusions of Law made by the trial court, Paragraphs 14 and 15 (See Record pages 56-57) is the following:

"14. The defendant, M. C. Garber, at the solicitation of D. J. Oven (a defendant here), on November 14, 1929, sold the said D. J. Oven his entire holding of 125 shares of stock in the Bank, together with other stocks. The sale was consummated after several days consideration, the stock certificates regularly endorsed, delivered and surrendered for transfer, and a new certificate for the full amount thereof was issued and delivered to said D. J. Oven. The total consideration for the entire transaction was $25,625 which was paid in due course, and admittedly included a valuable consideration for the bank stock.

"15. The sale was made by Judge Garber, without any information on his part of any impending failure of the bank, or that it contemplated going out of business or selling its assets, and without any knowledge that the Crews heirs had a claim against the bank, and in the belief that the Bank was solvent. His claim of good faith is not disputed."

In the Findings of Fact and Conclusions of Law by the trial court, in Sub-Paragraph C-10 (See Record page 57) the court found as follows:

"Stockholder transferring stock within sixty-day period liable."

"C-10. Those who were stockholders and transferred their stock at any time within the sixty-day

period prior to November 26, 1929, are liable secondarily, regardless of whether the transfer was or was not made in good faith."

The American National Bank paid every creditor during its process of liquidation save and except the unknown and unasserted claim of respondents and which they claimed to have discovered more than one year after the sale of its business and assets by the American National Bank to the First National Bank of Enid on November 25, 1929, and to recover which they filed suit in the District Court of Garfield County, Oklahoma, against the bank and some of its directors on December 14, 1931.

Upon the foregoing state of facts, the trial court held that petitioner, M. C. Garber, was subject to the double liability provided by Par. 64, Title 12, U. S. C. A., and levied an assessment against the 125 shares of stock in the American National Bank which he had sold to D. J. Oven on November 14, 1929, and rendered judgment against petitioner for the amount of the assessment and retained jurisdiction to make further and additional assessments. This judgment was affirmed by the Circuit Court of Appeals and it is to reverse such judgment that petitioner comes to this court.

THE QUESTION PRESENTED.

Whether the petitioner as a former stockholder in the American National Bank of Enid, Oklahoma, is subject to assessment as a stockholder in said bank under the provisions of Par. 64, Title 12, U. S. C. A., he having made a *bona fide* sale of his stock for valuable consideration in good faith on November 14, 1929, more than sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure and where, at the time of such sale,

such bank was a solvent and going concern except for an undisclosed and unknown liability to a creditor which was not asserted until a suit was filed by such creditor on such claim more than one year subsequent to the sale by petitioner of his stock, and where such claim was unknown to the creditor filing such suit for more than a year after the sale of such stock and upon which claim the creditor recovered a judgment against such bank on October 29, 1937, nearly eight years after the sale by petitioner of his stock in said bank, and where it is an agreed fact in the case that except for such judgment subsequently recovered by such creditor, that the bank in question was a solvent and going concern and that there is no other creditor of said bank, and where the sale of such stock was made by petitioner in good faith and without any intention of trying to avoid liability as a stockholder in such bank.

ARGUMENT.

We contend that the interpretation placed by the Circuit Court of Appeals on that part of the language of Par. 64, Title 12, U. S. C. A., reading as follows:

> "The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer."

is erroneous and is in conflict with the applicable decisions of this court and other federal courts and of state courts and the interpretation so placed upon that part of Section 64 is not the correct or true meaning thereof.

The Circuit Court of Appeals in its original decision disposed of this question in the following language quoted therefrom (See Record pages 119-120).

> "INSOLVENCY OF THE BANK.
>
> "The American National Bank closed its doors as a banking institution on the evening of November 25, 1929. Thereafter it did no banking business. The $240,000 involved in this suit was distributed to the stockholders in December, 1929. After its distribution, the only asset the bank had was the right to receive an additional $100,000 from the First National Bank of Enid when the paper which it had guaranteed was paid, but its total liability on its guarantee of paper amounted to $138,591.48. In addition, it had outstanding appellees' claim of $249,000.
>
> "A national bank is insolvent within the meaning of the National Bank Act, 12 U. S. C. A., Sec. 21,

et seq., when it is unable to meet its obligations when they mature. While appellees' claim was contingent and unknown at the time the bank closed its doors, it must be considered in determining the solvency of the bank. It is quite obvious that the American National Bank was wholly unable at any time after it closed its doors on the evening of November 25, 1929, to meet its obligations and that its insolvency dates from that time. All stockholders, including appellant, M. C. Garber, in No. 2783, who transferred their stock within sixty days prior to November 26, 1929, were liable for the stock assessments even though the transfers were made in good faith."

In its opinion on Petition for Rehearing handed down on August 26, 1944, the Circuit Court of Appeals again considered this question and disposed of it in the following language, to-wit (See Record page 131):

"M. C. Garber, appellant in Number 2873, has filed a petition for rehearing in which he contends that we misinterpreted 12 U. S. C. A., Sec. 21 *et seq.*, as it affects the liability of one who transfers stock in a banking institution. It is contended that we established the date on which it was determined that the bank was insolvent in the sense that its liabilities exceeded its assets rather than the date on which the bank failed to meet its obligations when they matured as the date which determines the liability of one transferring stock. With this we cannot agree. We agree that it is the date on which a bank fails to meet its obligations that determines the liability of one transferring his stock. It is true that the word 'insolvency' is not used in the applicable statute. The opinion could well have omitted the use of the word 'insolvency.' However, there can be no question as to the sense in which we used the term. We defined insolvency for the purpose of determining the liability of one transferring stock as being the failure of a bank to meet its obligations when they mature. We said: 'A national bank is insolvent within the

meaning of the National Bank Act, 12 U. S. C. A., Sec. 21 *et seq.*, when it is unable to meet its obligations when they mature.' Inability to meet its obligations is the test which establishes the liability of one transferring stock. We do not understand the law to require that a claim be actually presented for payment and that payment be refused before liability attaches. We know of no case holding to that effect. Certainly the case of *Brown* v. *Rosenbaum*, 41 N. E. 2d 77, upon which appellant relies, does not so hold. It holds that where a bank is closed and a conservator is appointed, the day on which the bank was closed may determine both the date on which the rights of creditors and the liabilities of stockholders attach. In *People* v. *Merchants' Trust Co.*, 79 N. E. 1004, it was held that the appointment of a temporary receiver and the taking of assets by him operated to prevent the defendant from paying the claims of creditors and therefore obviated the necessity of a formal demand for payment. In *Broderick* v. *Aaron*, (N. Y.) 197 N. E. 274, 103 A. L. R. 684, the superintendent of banks took possession of a bank on December 11, 1930. It did not appear that on that date the bank was actually insolvent. The court held that 'none the less the closing of the bank occasioned an automatic default in the payment of its debts and liabilities.'

"Garber sold his stock November 14, 1929. The bank disposed of its business and closed its doors November 25, 1929, and did not function as a banking institution thereafter. It went into voluntary liquidation and appointed a liquidating agent December 20, 1929. The directors distributed the $240,000 received from the First National Bank of Enid some time in December, 1929, to the stockholders of record as of November 25. Thereafter the bank had not a single dollar with which to meet any claim. Its doors were closed and it had ceased to function as a banking institution. The presentation of a claim for payment after that would have been a mere formality. By this course of conduct the bank automatically disqualified

itself from meeting any of its obligations. To hold that it was still necessary that a claim be presented and dishonored before a stockholder's liability attached would be adopting a strained construction, entirely out of line with the purpose sought to be accomplished by the statute.

"The petition for rehearing is Denied."

We contend that this additional opinion by the Circuit Court of Appeals is likewise an erroneous interpretation of the federal statute in question and in conflict with the applicable decisions of this Court and other federal courts and state courts.

We likewise contend that under the undisputed facts in this case there is no liability on the part of petitioner under Par. 64, Title 12, U. S. C. A., for an assessment against stock which he had sold to D. J. Oven on November 14, 1929.

The American National Bank never did fail as a bank; there was no failure on its part to meet its obligations within sixty days from November 14, 1929, the date when M. C. Garber sold his stock to D. J. Oven. The bank sold its assets and business to the First National Bank of Enid, Oklahoma, on November 25, 1929, and the purchasing bank assumed responsibility for its deposits and all of its known obligations. The claim of the plaintiffs (respondents) was not asserted until they filed their suit against the American National Bank on December 14, 1931. They did not know that they had any such claim until within a year prior to the filing of their suit. In the meantime, the American National Bank was voluntarily liquidated. No receiver or conservator was ever appointed for it. Upon closing out its business it refunded to the stockholders their investment in the capital stock and surplus of the bank, no part of which was received by M. C. Garber, and no claim was made against him on the first cause of action.

He is only interested in the claim asserted in the second cause of action under the double liability provisions of Section 64.

We have heretofore quoted the decision of the Circuit Court of Appeals disposing of this question both in its original opinion and on rehearing.

Not a suggestion can be found in the record of any obligation or claim which the American National Bank failed to meet within sixty days after November 14, 1929, the date of the sale of his stock by petitioner, nor for a much longer period, the fact being as found by the lower court that there is no other creditor than the plaintiffs (respondents) in this case.

This is an established and admitted fact in this case which was recognized by the Circuit Court of Appeals in its opinion in disposing of the appeal of certain directors from the personal judgment rendered against them upon the third cause of action and which judgment was reversed by the Circuit Court of Appeals with instructions to dismiss such cause of action.

In that part of the opinion and referring to the liquidation of the bank, the court had first referred to the Statute, 12 U. S. C. A., Par. 182, making it the duty of directors of a bank which had gone into voluntary liquidation to publish a notice to creditors for a period of two months in a newspaper published in the City of New York, and also in a newspaper published in the City or Town in which the bank is located and which notice was published in both places by the directors, but which notice was not published until after the payment back to the stockholders of the $240,000, the court said (See Record page 118):

> "Every known claim had been paid and satisfied. No one connected with the liquidation of the bank had any reason to believe that there existed any pos-

sible claim against these funds. Under these circumstances we do not believe it can be said that there was a violation of their common law duty to exercise reasonable care in paying this money to the stockholders.

"But even if it be said that they were negligent in the disbursement of this money, still they are not personally liable. They are liable only for such loss as proximately results from their negligence. The mere fact that the directors do not know of the existence of a claim does not relieve them from failure to publish the notice. One purpose of the notice is to permit those who have claims of which the bank has no knowledge to present them and call them to the attention of the officers. *But here the appellees themselves did not know at that time that they had a claim against the American National Bank. They did not know it for considerably more than a year after the bank ceased doing business and went into liquidation.* It must then be conceded that had this notice been published, this claim would not and could not have been presented. It follows that the failure of the appellees to reach this fund of $240,000 in the hands of the liquidating agent was not the proximate result of any claimed negligence on the part of the directors. Nothing that could have been done in the course of an orderly, timely liquidation would have made the fund available for the satisfaction of a claim *the existence of which was unknown to any of the parties to this litigation for more than a year after the liquidation was undertaken.*"

In disposing of the question of laches which had been raised as to the first and third causes of action, the Circuit Court of Appeals further said (See Record page 114):

"These equitable considerations are especially applicable to this case. Appellants were only secondarily liable. Their duty to respond depended upon the ability of appellees to obtain a money judgment against the American National Bank. Appellees' claim was an unliquidated demand founded in a tort of a very controversial nature, as is evidenced by the fact

that the judgment was sustained by the Supreme Court by a bare majority."

In order that the court may have Section 64 before it, we copy it and it is as follows:

> "64. Individual Liability of Shareholders: transfer of shares.
>
> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure (Dec. 23, 1913, Ch. 6, Sec. 23, 38 Stat. 273)."

The statute under which the plaintiff's (respondents) seek to fasten liability on M. C. Garber, was passed for the purpose of preventing stockholders in a bank which was about to fail or who had knowledge of its impending failure from transferring their stock to irresponsible persons and thereby evading liability to the creditors of the failing bank and holding the stockholder liable if he made such a sale within such period of time.

The Circuit Court of Appeals fell into an error in interpreting the part of Section 64 in question and in holding that a stockholder who had sold his stock was liable under the double liability provision if such bank was in-

solvent at time of such sale notwithstanding the fact that it was a going concern and continued to be for more than sixty days after such sale and in holding that the judgment recovered by the plaintiffs (respondents) against the bank on October 29, 1937, was retroactive and rendered the bank insolvent on November 25, 1929, the date when it sold its business and assets and that it was unable to pay its obligations and therefore had failed to meet its obligations on that date on account of the adjudication of the claim of plaintiffs (respondents) nearly eight years thereafter.

Such interpretation we contend, is clearly in conflict with the former decisions of this court, other federal courts and state courts.

The statute in question does not in words prohibit the sale of stock when a bank is insolvent as insolvency is properly defined and interpreted by the decisions of this court, but only creates such liability where the stock is sold within sixty days next before the failure of the association to meet its obligations or with knowledge of such impending failure.

Even if the word insolvent had been used, it would not justify the finding of the trial court in this case or the decision of the Circuit Court of Appeals that the American National Bank was insolvent on November 14, 1929, and on November 26, 1929, the day after it ceased to do business. The court found that the bank was solvent at those times excluding the claim of the Crews heirs and could only find that the bank was insolvent upon the theory that the judgment obtained by them on October 29, 1937, was retroactive for the purpose of determining not only the solvency of the bank but that the bank had failed to meet its obligations within 60 days after November 14, 1929, which we contend is not the law and cannot be true under the situation in this case.

One of the land-marks in the adjudicated cases on this question is *Earle* v. *Carson*, 187 U. S. 42, 47 L. Ed. 373, in which the opinion was written by Mr. Justice White, and while it is true that this case was decided prior to the adoption of the amended Section 64, nevertheless the rules of construction laid down in this decision are just as applicable to the amended statute as to the original Section 63.

In the opinion in this case, the court uses the following language:

> "The qualification just stated gives no support to the proposition that where a sale of stock in a national bank is made in good faith, nevertheless the consequences of the sale are avoided if subsequently it develops that the bank was insolvent at the time of transfer in the sense that its assets were then unequal to the discharge of its liabilities when such fact was unknown to the seller of the stock at the time of the sale."

Further on in this opinion in discussing the question of what is meant by the term "insolvency" of a bank, this court clarifies that expression by the following language:

> "The error of the argument arises from the fact that it affixes to the word 'insolvency' as found in the sentences quoted, the erroneous import hitherto pointed out; that is, an inadequacy of the assets of a bank to pay its liabilities, instead of giving to it its true meaning, that of failure and consequent suspension of business."

In other places in the opinion in this case, this court stated as follows:

> "It is undisputed that at the date when the stock was sold the doors of the bank were open, and it had not failed in business. Hence, the proposition is this: Although a national bank has not suspended payment, all sales of its stock, whatever may be the good faith

with which they are made, are void if it develops that at the date of the sale the assets of the bank, if they had been then realized on, would have been insufficient to pay its debts. The proposition is supported by what is assumed to be the essential nature of the double liability of a stockholder in a national bank and the time when such liability, by operation of law, becomes irrevocably fixed. Passing for a moment an analysis of the premises upon which the argument proceeds, let us determine the result to which it necessarily leads. Proceeding to do so, it becomes clear that the effect of maintaining the argument would be to virtually prevent the exercise of the power to transfer stock 'like other personal property,' which the statute gives in express terms. Rev. Stat. 5139, U. S. Comp. Stat. 1901, p. 3461. That such would be the result if the validity of every sale of stock depended, not upon the good faith of the seller, but upon the condition of the bank as subsequently developed is, we think, obvious. Certainly, it cannot in reason be said that the power would exist to sell stock like any other personal property if, before the power could be exercised, the seller must examine the affairs of the bank, marshal its assets and liabilities in order to form an accurate judgment as to the precise condition of the bank. But it has long since been pointed out (*First Nat. Bank* v. *Lanier*, 11 Wall. 377, 20 L. Ed. 174) that—

> 'The power to transfer their stock is one of the most valuable franchises conferred by Congress on banking associations. Without this power it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of stock a safe mode of investment, and easily convertible, tends to enhance their value. It is not less the interest of the shareholder than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage.

'It is in obedience to this requirement that stock certificates of all kinds have been construed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable.'

* * * * * * *

"If the proposition were sustained it would thus come to pass that the power of stockholders to freely transfer their stock like any other personal property would be burdened with a restriction arising from the unknown insolvency of the bank, while such limitation would not apply to any other contract concerning the property or affairs of the bank. This would be to hold that the statute had conferred the lesser freedom of contract where it was its avowed purpose to give the greater. It would, besides, require us to say that a limitation resulting from unknown insolvency was made effective upon a stockholder in transferring his stock, when such restriction was not made operative on the bank and its officers when they entered into contracts. But this would cause the unknown insolvency to restrict the power of the person less likely to be aware of its existence, and to cause it not to be controlling where knowledge was most apt to obtain. Taking into view the whole act—the provision conferring the power to transfer stock; the one already referred to, which avoids contracts made in contemplation of insolvency; the authority conferred upon the Comptroller to constantly test the condition of a national bank; the right given him to suspend the business of such bank when the exigencies of its situation require it; and the double liability imposed on the registered stockholders—we think it results that the power to transfer stock, like other personal property, is not limited by the mere fact that at the time of the transfer the bank, which was a going concern,

was insolvent in the sense that its assets, if liquidated, would not discharge its liabilities, unless it be shown that the seller was aware of the fact, and had sold his stock to avoid the double liability which was impending."

This case of *Earle* v. *Carson* is so important and the law as therein enunciated so applicable to the situation under consideration in the case at bar, that we felt impelled to copy the foregoing extracts therefrom and in addition thereto, we refer to the entire opinion in the case and adopt the same as a part of this brief.

It is referred to and reaffirmed in the case of *McDonald, Receiver,* v. *Dewey et al.*, 202 U. S. 510, 50 L. Ed. 1128. From this case we take the following:

" 'Certainly,' said Mr. Justice White in the opinion (p. 46, L. Ed., p. 376, Sup. Ct. Rep., p. 256), 'it cannot in reason be said that the power would exist to sell stock like any other personal property, if, before the power could be exercised, the seller must examine the affairs of the bank, marshal its assets and liabilities, in order to form an accurate judgment as to the precise condition of the bank.'

"In discussing the question in regard to the validity of the transfer, it was said (p. 49, L. Ed., p. 377, Sup. Ct. Rep., p. 257) that 'the exercise of the power to transfer stock in a national bank is controlled by the rules of good faith applicable to other contracts. The qualification just stated gives no support to the proposition that, where a sale of stock in a national bank is made in good faith, nevertheless the consequences of the sale are avoided if subsequently it developed that the bank was insolvent at the time of the transfer, in the sense that its assets were then unequal to the discharge of its liabilities, when such fact was unknown to the seller of the stock at the time of the sale.' "

* * * * * * *

"1. We think it a proper deduction from the prior cases, and such we hold to be the law, that the gist of the liability is the fraud implied in selling with notice of the insolvency of the bank, and with intent to evade the double liability imposed upon the stockholder by the national banking act. In short, the question of liability is largely determinable by the presence or absence of an intent to evade liability. The fact that the sale was made to an insolvent buyer is doubtless additional evidence of the original fraudulent intent, but would not be in itself sufficient to constitute fraud without notice of the insolvency of the bank. The stockholder is not deprived of his right to sell his stock by the fact that the sale is made to an insolvent person, unless it be made with knowledge of the insolvency of the bank. This was practically the ruling in *Earle* v. *Carson*, in which we held that a *bona fide* sale would not be void, though the vendee were insolvent, if the fact of such insolvency were at the time unknown to the seller. The case of *Earle* v. *Carson*, so far from lending countenance to the argument of the appellees, bears strongly in the opposite direction."

We next call attention to the case of *Hodges* v. *Meriweather*, (C. C. A. 8) 55 F. 2d 29. This is a case decided under the provisions of Section 64. The third paragraph of the syllabus reads as follows:

"3. Banks and Banking 249 (1).

"Stockholder, transferring shares *bona fide* over 60 days from bank's failure, without knowing or having reason to believe that bank is insolvent, is not subject to stockholder's liability (12 U. S. C. A., Sec. 64)."

We next refer to the case of *Fowler* v. *Crouse et al.*, (C. C. A.) 175 Fed. 646, the first paragraph of the syllabus reads as follows:

"1. Banks and Banking (Section 249)—National Banks—Double liability of stockholders—Transfer of stock.

"A Stockholder in a national bank divests himself of the double liability imposed by the statute for the protection of creditors by a transfer of his stock when the bank is solvent, or even if insolvent, by a *bona fide* transfer without knowledge of the insolvency; the only ground for holding him liable after a transfer being fraud."

If the American National Bank had not sold its business on November 25, 1929, there would have been no failure on its part to meet its obligations within sixty days from the date of such sale because it was a going concern and solvent except for the undisclosed, unasserted claim of the Crews heirs, and every other obligation that it had was fully paid and satisfied which is an admitted and established fact in this case and there was no other creditor than the Crews heirs and even they did not know that they had such a claim until more than a year after the sale of the bank. Therefore, having no knowledge that they had a claim against the bank they could not have presented it or made demand upon it or asserted it within sixty days from the sale of the bank and the bank could not have failed to pay a claim about which no one knew and as was said by the Circuit Court of Appeals in reversing the judgment against the directors,

"No one connected with the liquidation of the bank had any reason to believe that there existed any possible claim against these funds" (See Record page 118).

In January, 1930, the directors of the bank published the statutory notice in an Enid newspaper, which notice was published for eight consecutive weeks, the first publication being on February 6, 1930, and the last on March 27,

1930, together with a companion notice by the First National Bank of Enid stating that it had succeeded the American National Bank of Enid by the purchase of its assets and had assumed the payment of its liabilities (See Record pages 101-102).

The trial court held that this notice did not conform to the statutory requirements because it was not published for two calendar months, whereas it was published for eight consecutive weeks, which fell a little short of the two full months, but the fact remains that these notices were published and for all practical purposes had the same effect as if published for the two full months.

The plain fact of the matter is as disclosed by the record in this case, that the sale of the American National Bank to the First National Bank of Enid on November 25, 1929, was a perfectly legitimate and *bona fide* transaction and in which deal the First National Bank paid a liberal bonus for the business of the American National Bank which was a solvent and going concern, and that prior to this sale on November 14, 1929, the petitioner, M. C. Garber, had made an actual, *bona fide* sale of his stock in the American National Bank to D. J. Oven who was one of its directors and at which time the petitioner did not even know of the proposed sale of the bank and made such sale without any intention of avoiding liability as a stockholder and sold his stock because Oven solicited him to sell it and they finally agreed on terms and Judge Garber did sell it without the slightest intimation that a claim would be asserted by the respondents against the American National Bank more than two years later. Certainly it was never intended that under such a set of circumstances as these the petitioner should be liable for a double assessment on his stock due to the fact that more than two years after he sold it a suit was filed against the bank and six years later a judgment was rendered in that case against

the bank, and which judgment was for unliquidated damages based upon a tort of a very controversial nature as stated by the Circuit Court of Appeals in its opinion.

The exact question involved in this case has been passed upon in the case of *Brown* v. *Rosenbaum,* (Court of Appeals of New York) 287 N. Y. 510, 41 N. E. 2d 77. Certiorari denied by the United States Supreme Court May 25, 1942; 62 S. Ct. 1282, 86 L. Ed. 1760. This case interprets the provisions of Section 64 and as to what is meant by the language "failure of such association to meet its obligations or with knowledge of such impending failure," and if the law is as stated in this decision, which has been approved by this court by the refusal to grant Certiorari, then there is no question but what this judgment against M. C. Garber must be reversed. We adopt the following extract from that case as a part of our argument. The first head-note in the above entitled case reads as follows:

> "1. Banks and Banking 248(1).
>
> "A bank has not failed to meet its obligations within statute imposing liability on stockholders of national bank which fails to meet its obligations, so long as the bank pays its obligations at the time and place they are payable."

From the opinion, which we ask the court to read in full, we extract the following:

> "(1) It is clear that a bank has not failed to meet its obligations within the meaning of the statute so long as it pays its obligations at the time and place its obligations are payable. While all banks remained closed by command of the government, the date when payment of the obligations of each and all banks became due and could be demanded was postponed. Certainly no solvent bank which resumed business and paid its obligations when permitted by the government was

in default in any payment for which it would have been liable in the interval if the date for payment had not been postponed. The appellant, of course, does not claim otherwise. His claim is that where a bank was insolvent at the time it was closed by governmental authority and for that reason was not thereafter permitted to reopen, the date on which it was compelled to close under proclamation of the President or of the Governor fixes the time when rights of creditors and the responsibility of stockholders for the debts of the bank became fixed.

"Under the National Banking Act the right of creditors against a national bank attach when an 'act of insolvency' is committed. See U. S. Code, Title 12, Sec. 91, 12 U. S. C. A., Sec. 91. The directors have no power after that date to change or defeat such rights by preferential payments or other devices. Under ordinary circumstances the date of insolvency is fixed when the assets of a bank are surrendered by its directors to the Comptroller for administration or when the Comptroller exercises administrative authority to conserve or liquidate bank assets. During the banking holiday when all banks were closed by governmental authority and payment of any banking obligations was prohibited, there was no occasion for the Comptroller to take possession of the assets of an insolvent banking association in order to conserve them or to prohibit the insolvent banking association from continuing to conduct its banking business. When an insolvent bank was denied permission to reopen for regular business after the end of the banking holiday, though solvent banks then resumed their usual banking operations, the date when the right of creditors attached was properly fixed at the time when 'the facts indicated that the bank would not be able to pay its depositors in due course' though at that time the banking holiday was not completely at an end. *Downey* v. *City of Yonkers*, 2 Cir., 106 F. 2d 69, 74, affirmed 309 U. S. 590, 60 S. Ct. 796, 84 L. Ed. 964. See also, *Bryce* v. *National City*

Bank of New Rochelle, (D. C.) 17 F. Supp. 792, affirmed 2 Cir., 93 F. 2d 300.

"Congress has not, however provided that the liability of stockholders like the rights of creditors against an insolvent bank, attaches at the date of an 'act of insolvency.' Congress has expressly provided that liability of stockholders of an insolvent banking association attaches and becomes fixed upon 'the date of the failure of such association to meet its obligations.' The time when it appears that insolvency makes it impossible for a bank to meet all its obligations as they mature has been chosen by Congress as the appropriate date upon which the rights of creditors against the bank attach; *the time when a bank is actually in default in meeting its obligations as they become due has been decreed by Congress as the appropriate date upon which the liability of stockholders of the bank attaches. Often, perhaps usually, the dates will coincide—not always"* (Emphasis ours).

In its opinion on the Petition for Rehearing, in this case (See Record page 132), the Circuit Court of Appeals referred to the case of *Brown* v. *Rosenbaum,* from which we have heretofore quoted, and said among other things:

"We defined insolvency for the purpose of determining the liability of one transferring stock as being the failure of a bank to meet its obligations when they mature. We said: 'A national bank is insolvent within the meaning of the National Bank Act, 12 U. S. C. A., Par. 21, *et seq.,* when it is unable to meet its obligations when they mature.' Inability to meet its obligations is the test which establishes the liability of one transferring stock. We do not understand the law to require that a claim be actually presented for payment and that payment be refused before liability attaches. We know of no case holding to that effect. Certainly the case of *Brown* v. *Rosenbaum,* 41 N. E. 2d 77, upon which appellant relies, does not so hold. It holds that where a bank is closed and a conservator

is appointed the date on which the bank is closed may determine both the date on which the rights of creditors and the liabilities of stockholders attach."

A reference to the case of *Brown* v. *Rosenbaum* will show that what the court said in that respect is as follows:

> "(2, 3) Where, while other banks remain open, a bank is closed or is placed upon a restricted basis or is prohibited or prevented from paying its debts as they become due in order to conserve its assets pending determination whether it is insolvent or whether its capital has been impaired and if impaired whether the impairment can be corrected, there is a 'failure' of the bank 'to meet its obligations.' In such case the closing of the bank may determine both the date when the rights of creditors and the liability of stockholders attach. That is true even though at that time it is hoped that the closing may be only temporary."

Certainly where a bank is closed by either state or federal authorities and a conservator is appointed to take charge of its business and affairs and which precludes it from meeting its obligations as they mature, that would constitute a failure of the bank to meet its obligations as provided by Paragraph 64 as to obligations which were known and ascertainable, and which would otherwise have been paid in the ordinary course of business save for the involuntary closing of such bank by authorities, but such is not the fact in this case and nothing can be found in the *Brown* v. *Rosenbaum* case, which in any way modifies the interpretation which we have placed upon it.

Reference was also made by the Circuit Court of Appeals in its opinion, to the case of *Broderick* v. *Aaron,* (N. Y.) 197 N. E. 274, and referring to that case, said:

> "The Superintendent of Banks took possession of the bank on December 11, 1930. It did not appear

that on that date the bank was actually insolvent. The Court held that 'none the less the closing of the bank occasioned an automatic default in the payment of its debts and liabilities.' "

An examination of that case reveals that the Superintendent of Banks of the State of New York took possession of the Bank of the United States on December 11, 1930. That thereafter and on December 26, 1930, one of the parties to that suit acquired certain shares of stock of the closed bank and the suit was brought by the Superintendent of Banks against such parties seeking to enforce liability as a stockholder against such purchaser who had acquired the stock after the taking over of the bank by the Superintendent of Banks.

The court, in stating the proposition involved in the case, said as follows:

> "The question presented upon this appeal is whether a person who acquired stock in a banking corporation after the Superintendent of Banks has taken possession of its business and assets is subject to the liability imposed by law upon stockholders of a bank."

It was in connection with the disposition of that question that the Court of Appeals of New York stated in its opinion that it did not appear that on December 11, 1930, when the Superintendent of Banks took possession of the business of the Bank of the United States or on December 26th, when the appellant acquired his stock, that the bank was actually insolvent. Then the court said:

> "None the less, the closing of the bank occasioned an automatic default in the payment of its debts and liabilities."

This was bound to be true because the bank was taken over by the Superintendent of Banks and closed and it no longer continued to conduct the business of a bank.

Then, further on in the opinion, the court said:

> "We fail to find in the law any indication of intent to hold responsible for the debts and liabilities of a bank those who acquired stock in a banking corporation after it had ceased to do business as a bank under a mandate of the state. Until then, the responsibility could be shifted from one person to another by a transfer of stock."

Thus it will be seen that this decision not only does not sustain the opinion of the Circuit Court of Appeals, but supports our contention.

No one will contend but what, when a bank is taken over and closed by the representatives either of a state or the Federal Government, this suspends its activities as a bank and operates to create a default in the payment of obligations of the bank from that date forward, but that is not the case at bar where an entirely different state of facts is involved.

The Circuit Court of Appeals, in its opinion on the petition for Rehearing, referred to the case of *People* v. *Merchants' Trust Co.*, 79 N. E. 1004, as a supporting authority for the conclusions reached by it.

An examination of that case reveals that it has no applicability to the case at bar. That case was an action instituted by the Attorney General of the State of New York against the Merchants' Trust Co., a banking corporation, in which judgment was demanded that the corporation be dissolved and its assets distributed upon the ground that it had become insolvent and its capital stock impaired.

On May 23rd, the day the suit was filed, a temporary receiver was appointed to take possession of the assets of the defendant, and on June 24, 1905, a final judgment was rendered dissolving the corporation and appointing permanent receivers to wind up its affairs.

The receivers in that case did take charge of the assets of the banking corporation and proceeded to wind up its business and affairs and the court, in that case, held that the appointment of the temporary receiver and the taking possession of the assets of the bank by him operated to prevent the bank from paying the claims of its creditors and thereby obviated the necessity of a formal demand for payment on their part.

No such situation existed in the case at bar for the American National Bank was never closed by any governmental authority nor any receiver appointed for its assets but on the contrary, it voluntarily sold its business and assets to the First National Bank of Enid, which assumed all of its known obligations and paid it a large amount of money for its business and assets and every known obligation that it had was discharged in full and it was more than two years thereafter when the plaintiffs in this case first asserted their claim against the American National Bank by filing their action against it on December 14, 1931.

Both the trial court and the Circuit Court of Appeals select the date of November 26, 1929, the day after the sale of its business by the American National Bank to the First National Bank as the date from which to reckon back the sixty day period during which time the sale of his stock by a stockholder left him still subject to the double liability and which, of course, is an erroneous conclusion.

It is an admitted fact in this case that the American National Bank was a solvent and going concern up to the date of November 25, 1929, save and except for the unknown and undisclosed claim of the plaintiffs upon which they filed suit more than two years thereafter.

Not only does that presumption of solvency continue, but it is also an admitted fact that there was and is no other creditor of the bank save the plaintiffs.

Neither does the fact that the bank went into voluntary liquidation give rise to any inference or presumption of insolvency.

This court has repeatedly decided that a cause of action based upon a tort is not a debt in the ordinary sense of the word (See *Chase* v. *Curtis*, 113 U. S. 452, 28 L. Ed. 1038), in which this court, in the opinion, used the following language:

> "Damage arising upon tort is not a debt accrued, within any reasonable construction of that term. It is apparent, as well from a view of the whole section as from an analysis of its parts, that the intent of the framers of it was only to make the stockholders individually responsible for the debts of the company."

Even the Circuit Court of Appeals in disposing of the question of laches in its opinion in this case (See record page 112), used the following language:

> "The general rule is that where a claim is for unliquidated damages or for a simple contract debt, a creditor may not maintain a creditor's bill in equity until he has reduced his claim to a judgment in a court of law."

The Circuit Court of Appeals referred to the decision of this court in *Swan Land & Cattle Company* v. *Frank*, 148 U. S. 603, and said:

> "The corporation there had distributed all its assets to its stockholders and had ceased doing business. The Supreme Court held that a creditor who had an unliquidated claim against the corporation could not maintain an action in the nature of a creditor's bill against the stockholders who had received the assets to subject them to the satisfaction of their claim, without first having reduced the claim against the corporation to judgment. The court said:

> 'We are also clearly of opinion that the court below was correct in sustaining the demurrer to the bill upon the other ground assigned, that the complainant had not previously reduced its demand against the vendor corporations to judgment. That claim was purely legal, involving a trial at law before a jury. Until reduced to judgment at law, it could not be made the basis of relief in equity.' "

The liability sought to be enforced against the petitioner in this case must be found in the statute, otherwise it does not exist. It was unknown at common law and is in derogation of common law and unless, under a proper interpretation of Paragraph 64 applied to the admitted facts in this case, the liability of the petitioner is fixed, it does not exist.

In the case of *Hamilton* v. *Offutt et al.*, 78 F. 2d 735, the second head-note reads:

> "Statute imposing double liability on shareholders of bank is in derogation of common law and cannot be extended beyond words used."

This rule is announced in the opinion in the following language:

> "In the view we take of the question, it should be answered in the affirmative only in the event the statute which it is claimed creates it is clear and unambiguous, for the double liability of the shareholders of a corporation depends on the terms of the statute creating it; and as such a statute is in derogation of the common law, it cannot be extended beyond the words used. *Brunswick T. Co.* v. *National Bank*, 192 U. S. 386, 24 S. Ct. 314, 48 L. Ed. 491."

In the case of *Brunswick Terminal Company* v. *National Bank*, 192 U. S. 386, 48 L. Ed. 491, the court lays

down the following rule in the opinion by Chief Justice Fuller:

> "This additional liability of a stockholder depends on the terms of the statute creating it and as it is in derogation of the common law, the statute cannot be extended beyond the words used."

This rule has been announced so many times that further citation of authorities is unnecessary.

In its original opinion under the heading "Insolvency of the Bank" (See Record.....) in which the Circuit Court of Appeals held that the American National Bank should be considered insolvent on November 25, 1929, by reason of the retroactive effect of the judgment obtained by the respondents against the bank in 1937, and which conclusion we have heretofore pointed out, is in direct conflict with the decisions of this court, the Circuit Court of Appeals, in foot-notes Nos. 17 and 18, cited three cases in support of its conclusion, but which, in our opinion, entirely fail to lend any support thereto and we will briefly refer to the same.

The first case referred to is *Smith* v. *Witherow*, 102 F. 2d 638, which was a suit by the Receiver of a national bank against the executors of the estate of a deceased stockholder to recover an assessment levied by the Comptroller of the Currency. No question of liability of a stockholder after sale of his stock is involved in this case, other questions being involved, and various defenses being made to the enforcement of the assessment including the contention that the taking over of the bank while solvent by the Government through the appointment of a conservator and its operation by that official at a loss deprived them of their property without due process of law and thereby released them from their liability to pay the stock assessment.

The case involved the question as to whether or not the condition of the bank justified the appointment of a conservator, etc.; in connection with which it appears that on February 18, 1933, a financial panic prevailed, but after banking hours on that day the Federal Reserve Bank of Philadelphia demanded payment by the bank in question of certain items which became due on the following business day. The demand was refused, and the run on the following business day became a certainty. Thereupon the directors of the bank adopted a resolution restricting the withdrawal of deposits and its doors were never thereafter re-opened for the payment of deposits in ordinary course.

Thereafter, a conservator was appointed for the bank who continued in possession until January 23, 1934, when a receiver was appointed.

It thus appears that in that case the bank failed to meet its obligations from and after February 18, 1933, and never thereafter was able to meet them. There is nothing in that case which lends any support whatever to the conclusion of the Circuit Court of Appeals.

The next case cited is *Aycock* v. *Bradley,* 77 F. 2d, 14. This was an action by the receiver of a national bank against a former depositor of the bank to recover certain preferential payments which had been made to him during the last business day preceding its suspension of business. There was no question under the facts related in that case but what the bank was insolvent the day before it suspended business and on which day it permitted one of its stockholders to take from the note case of the bank certain warrants and promissory notes and pay for them with a check against his account in the bank, which was clearly a preferential payment, after the bank had committed an act of insolvency and such transfer was made in contemplation of insolvency with a view to creating a preference.

There is no analogy between that case and the case at bar.

The next case cited is *Kullman & Co.* v. *Woolley*, 83 F. 2d 129. This is another case involving a preferential payment to a depositor while the bank was on a restricted basis during the banking holidays and in the course of the opinion in that case the court used the following language:

> "The bank statute voids 'payments of money to either (shareholder or creditor) made after the commission of an act of insolvency or in contemplation thereof.' In the much-quoted case of *Roberts* v. *Hill*, (C. C.) 24 Fed. 571, 573, these terms are well interpreted thus: 'Insolvency, as ordinarily defined, is that condition of affairs in which a merchant or business man is unable to meet his obligations as they mature in the usual course of his business. *Thompson* v. *Thompson*, 4 Cush. (Mass.) 127; *Vennard* v. *McConnell*, 11 Allen (Mass.) 555; *Wager* v. *Hall*, 16 Wall. 584, 599 (21 L. Ed. 504). An act of insolvency takes place when this state of affairs is demonstrated and the merchant has *actually failed* to meet some of his obligations. A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations."

This case likewise furnishes no support for the conclusion of the Circuit Court of Appeals in this case.

The last case cited in the foot-note at the bottom of the page is *Scott* v. *Commissioner*, 117 F. 2d 36. This is the case cited by the Circuit Court of Appeals in support of that paragraph of its opinion which reads as follows:

> "While appellees' claim was contingent and unknown at the time the bank closed its doors, it must

be considered in determining the solvency of the bank."

Now, turning to *Scott* v. *Commissioner*, the only case cited in support thereof, we find that the suit was one against certain parties as transferees of certain assets of a corporation to hold them liable for a deficiency to the extent of the value of the property of the corporation received by them. The question involved was the liability of these transferees for a deficiency in the income tax liability of the corporation determined after the transfer.

The fourth head-note of this case reads as follows:

"4. Internal revenue Key No. 1738.

"In determining question of corporation's insolvency on issue of liability of distributees of corporation's assets for corporation's taxes under the statute, a liability for taxes, though unknown at the time, must be considered. Revenue Act, 1928, Section 311, 28 U. S. C. A., Int. Rev. Code, Sec. 311."

In the opinion the court says as follows:

"At the time of the transfer the entire amount of the tax against the corporation had not been assessed, but there was an added tax later determined. We have held that a subsequently levied tax is nevertheless a potential liability of the corporation, of which the stockholders are charged with notice. *United States* v. *Armstrong*, 8 Cir., 26 F. 2d 227; *Updike* v. *United States*, 8 Cir., 8 F. 2d 913. In determining the question of insolvency, a liability for taxes, though unknown at the time, must be considered. *Commissioner of Internal Revenue* v. *Keller*, 7 Cir., 59 F. 2d 499."

The defendants in that action were stockholders of the bank to whom assets of the bank had been distributed without taking care of this deficiency tax subsequently ascertained.

A liability for taxes occupies an entirely different status from that of an unasserted, unknown claim of an ordinary creditor and especially of the claim of one based upon a tort which does not take the status of a debt until reduced to a judgment.

In our opinion the authorities cited by the Circuit Court of Appeals entirely fail to furnish any support for their conclusion.

CONCLUSION.

For all of the foregoing reasons, we submit that the judgment of the trial court against the petitioner, M. C. Garber, was erroneous and that the judgment of the Circuit Court of Appeals, affirming the same, was likewise erroneous and we, therefore, request that such judgments be reversed and that the cause be remanded with directions to enter judgment in favor of the petitioner.

All of which is respectfully submitted.

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